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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

SOCIÉTÉ DU FIGARO, SAS, a French simplified
 joint-stock company; L'ÉQUIPE 24/24 SAS, a
 French simplified joint-stock company, on behalf of
 themselves and all others similarly situated; and LE
 GESTE, a French association, on behalf of itself, its
 members, and all others similarly situated,

Plaintiffs,

v.

APPLE INC., a California corporation,

Defendant.

No. 4:22-cv-04437-YGR

JOINT CASE MANAGEMENT STATEMENT

Hon. Yvonne Gonzalez Rogers

Pursuant to the Standing Order for All Judges of the Northern District of California and Civil Local Rule 16-9, Plaintiffs Société du Figaro, SAS (Figaro); L'Équipe 24/24 SAS (L'Équipe); and Le GESTE (GESTE) (collectively, Plaintiffs) and Apple Inc. (Apple) (collectively, the Parties) respectfully submit this Joint Case Management Statement.

I. JURISDICTION & SERVICE

Plaintiffs contend that this Court has subject matter jurisdiction over Plaintiffs' claims pursuant to Sections 4 and 15 of the Clayton Act, 15 U.S.C. § 15 and 15 U.S.C. § 26, respectively. Additionally, they contend that the Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1337, and 28 U.S.C. § 1367. Apple has been served with Plaintiffs' Complaint; no parties remain to be served. Plaintiffs have begun to evaluate Apple's Motion to Dismiss, which they received on October 28, 2022.

Apple has argued in its Motion to Dismiss that the Court lacks subject matter jurisdiction over aspects of Plaintiffs' case. Specifically, the Court lacks subject matter jurisdiction over any claims brought by GESTE, any claims challenging Apple's "App Tracking Transparency" functionality, and any claims challenging a commission rate lower than 30%.

II. FACTS

A. Plaintiffs' statement

1. Procedural summary

Plaintiffs filed their proposed class action suit in this judicial district on August 1, 2022. (ECF No. 1.) The Court related this matter to *In re Apple iPhone Antitrust Litigation*, N.D. Cal. No. 4:11-cv-6714-YGR (consumer case or *Pepper*); and to *Epic Games, Inc. v. Apple Inc.*, N.D. Cal. No. 4:20-cv-5640-YGR (*Epic Games* case), on September 2, 2022. (ECF No. 28.)

2. Substantive summary

Plaintiffs Figaro and L'Équipe are France-based iOS developers that distribute iOS apps and in-app products in or via Apple's exclusive App Store (or, in the case of in-app digital products, in apps acquired therefrom). Plaintiff GESTE is a France-based association representing developers, including iOS developers such as these.

1 Among other claims, Plaintiffs allege that Apple has acquired and maintained monopoly (or,
2 alternatively, monopsony) power as it relates to iOS app distribution and in-app payment, or IAP,
3 services. While Apple refers to Plaintiffs’ market allegations below, notably, it does not challenge
4 them in its motion to dismiss. Market determinations are factually intensive; furthermore, Plaintiffs
5 have alleged (and will demonstrate) that here, a single-brand market is present, *or, in the alternative*,
6 that Apple willfully dominates even a multi-brand market to the point of monopolization. (*See, e.g.*,
7 Complaint (ECF No. 1), ¶ 92 and n.77, 205.)

8 Plaintiffs contend that Apple has overcharged developers for distribution and in-app purchase
9 (IAP) services (or underpaid them for their digital products). They also contend that its practices have
10 led to lost profits (including by way of overcharges or underpayments for their iOS digital products),
11 as well as decreased output and innovation, all to the detriment of competition.¹

12 Plaintiffs also allege that Apple’s exclusion of competition results in the App Store being
13 hopelessly overcrowded, such that end-users cannot find developers’ digital products (which itself
14 diminishes output). And while in *Cameron* those plaintiffs were pleased to have negotiated a settlement
15 which included provisions addressing in-part search and results (the agreement speaks for itself); that
16 resolution was, of course, a compromise of those plaintiffs’ claims. Also, the relief is to apply “for a
17 period of at least three (3) years following the Final Approval Order.” (S. Berman Decl., *Cameron*
18 ECF No. 396-1, Ex A (*Cameron* Stipulation of Settlement), § 5.1.)

19 Further, Plaintiffs allege that Apple abuses its market power by mandating minimum and end-
20 in-€X9 pricing for paid apps and in-app products. Indeed, after plaintiffs filed their complaint, Apple
21 mandated major end-user price increases, including in the French storefront, raising the minimum price
22 for paid products from €0.99 to €1.19. (“Upcoming price and tax changes for apps and in-app
23 purchases,” Sept. 19, 2022, available at: <https://developer.apple.com/news/?id=e1b1hcmv> (last
24 accessed Oct. 31, 2022).) This required price increase, and its effects on output, will be alleged in any
25 amended complaint.

26
27 ¹ These and other characterizations are mere summaries. Plaintiffs’ current allegations are set forth
28 in their Complaint.

1 Plaintiffs, whose relevant contracts with Apple contain United States and California choices of
 2 law, allege violations of Section 2 of the Sherman Act under monopoly and attempted monopoly
 3 theories, as well as under alternative monopsony and attempted monopsony theories. They also allege
 4 violations of California’s Unfair Competition Law and Cartwright Act. They ask that the Court certify
 5 a U.S. federal law class (or classes) and a proposed California-law class (or classes).

6 **B. Apple’s statement**

7 This case was filed over three years after plaintiffs’ counsel filed an almost identical lawsuit in
 8 *Cameron, et al. v. Apple Inc.*, Case No. 4:19-cv-03074-YGR (N.D. Cal.). *Cameron* was a putative
 9 class action brought by U.S. iOS app developers, and the Court entered final judgement in that case
 10 pursuant to a settlement on July 15, 2022.² The allegations in this Complaint overlap almost entirely
 11 with those in *Cameron*. As in *Cameron*, Plaintiffs’ monopolization claims here depend on Apple-only
 12 markets that have been considered and rejected by this Court and others.³ *See, e.g., Reilly v. Apple Inc.*,
 13 578 F. Supp. 3d 1098, 1107-09 (N.D. Cal. 2022); *Coronavirus Reporter v. Apple Inc.*, 2021 WL
 14 5936910, at *8-13 (N.D. Cal. Nov. 30, 2021); *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898,
 15 1021-26 (N.D. Cal. 2021). Likewise, the Complaint’s allegations of anticompetitive conduct largely
 16 mirror those in the related cases as well.

17 But as Apple has maintained in this Court and others, it is not a monopolist, and its App Store
 18 business model is demonstrably procompetitive. The App Store is a part of the iOS ecosystem and was
 19 designed from the ground up for the use, development, sale, and distribution of apps. It was, in many
 20 ways, the first platform of its kind, and Apple committed to making it a safe and trusted place for
 21

22 ² Plaintiffs make the same allegations as in *Cameron* about over-crowding and discoverability on
 23 the App Store. But structural commitments in the *Cameron* settlement, negotiated by the same
 24 plaintiffs’ counsel as here, were designed to address precisely those allegations, among others, and to
 25 benefit “other developers,” like plaintiffs here, outside the *Cameron* settlement class. Motion for
 26 Preliminary Approval of Class Action Settlement, *Cameron* Dkt. 396, at 20; *see also* Berman Decl.,
Cameron Dkt. 396-1, Ex A (*Cameron* Stipulation of Settlement), § 5.1 (including, e.g., commitments
 concerning App Store search and a transparency report with “objective data regarding search queries
 and results”).

27 ³ Apple made clear in its Motion to Dismiss that Plaintiffs’ market allegations are flawed. *See* Dkt.
 28 41 at 11. That Apple did not address all the deficiencies in Plaintiffs’ market allegations does not mean
 that Apple made any concessions relating to them.

1 customers to discover and download apps, and a great business opportunity for all developers. The
 2 App Store has exponentially expanded consumer choice, putting access to well over a million
 3 applications and services at consumers' fingertips. Security and seamless performance are at the core
 4 of Apple's iOS ecosystem, and Apple holds iOS apps to a high standard for privacy and content. In
 5 keeping with this commitment to consumer privacy, Apple has introduced its App Tracking
 6 Transparency ("ATT") functionality, expanding consumer choice to opt out of certain third-party
 7 tracking.

8 The primary difference between this action and *Cameron* is that this action purports to advance
 9 the interests of putative classes of *France-resident* iOS developers and seeks relief related to their
 10 transactions on *non-U.S.* Apple storefronts.⁴ But those claims are, at least in large part, barred by the
 11 Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (FTAIA). The Complaint also briefly attacks
 12 as anticompetitive Apple's ATT feature. But neither of these deviations from *Cameron* suffices to give
 13 rise to a new, timely developer action that should proceed past the pleadings phase here.

14 III. LEGAL ISSUES

15 A. Plaintiffs' statement

16 Among the legal issues raised by Plaintiffs' Complaint are:

17 Whether Apple has unlawfully achieved and maintained monopoly or, alternatively,
 18 monopsony, power in one or more relevant markets or sub-markets for iOS distribution and IAP
 19 services, or for retailing iOS applications and other digital products in violation of Section 2 of the
 20 Sherman Act, 15 U.S.C. § 2, including unlawful tying pursuant to Section 2 of the Sherman Act,
 21 whether as a *per se* violation thereof or under the rule of reason or other applicable standard, such that
 22 Plaintiffs and the proposed classes are entitled to treble damages and injunctive relief as requested in
 23 their Complaint;

24
 25
 26
 27 ⁴ With respect to le GESTE, Apple notes that Plaintiffs have not identified in their Complaint any
 28 members of its association.

Whether Apple has violated California’s Unfair Competition Law and Cartwright Act with respect to the conduct alleged in Plaintiffs’ Complaint, such that Plaintiffs and the proposed classes are entitled to restitution and injunctive relief as requested in their Complaint; and

Whether a class or classes should be certified pursuant to Fed. R. Civ. P. 23, including pursuant to sections (b)(1), (b)(2), and/or (b)(3).

Plaintiffs learned with certainty that Apple would raise FTAIA defenses in the current matter when Apple filed its motion to dismiss three days ago. Plaintiffs’ view is that these defenses are fraught with factual issues, including as to their own and other France-based iOS developers’ participation in the domestic U.S. market for the Apple services at issue. (*See, e.g.*, Complaint, ¶¶ 23-24, 225-35.)

B. Apple’s statement

It is Apple’s position that, in addition to those listed by Plaintiffs above, central legal issues in dispute include all elements of claims under Sherman Act Section 2, Clayton Act Sections 4, 15, and 16, California’s Cartwright Act, and California’s Unfair Competition Law. Legal issues in the case also include (but are not limited to) the following: whether Plaintiffs’ claims are barred, in whole or in part, by the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (FTAIA); whether GESTE has Article III or statutory standing; whether Plaintiffs have defined legally cognizable markets; whether Plaintiffs can prove anticompetitive or exclusionary conduct by Apple under any recognized theory; whether Plaintiffs can prove a lack of legitimate business justification for Apple’s conduct; whether Plaintiffs can prove that the alleged conduct has harmed competition; whether Plaintiffs suffered causal injury; whether Plaintiffs suffered antitrust injury and damages; whether Plaintiffs’ claims are barred, in whole or in part, by the applicable statutes of limitations or laches; whether Plaintiffs may seek restitution; and whether any affirmative defenses apply.

In *Cameron*, Apple made known its position that claims based on “transactions . . . related to retail sales to end users in or via foreign storefronts for Apple’s App Store” would be barred by the FTAIA: The July 28, 2020 Joint Case Management Conference Statement in *Cameron* discusses Apple’s objection to any potential amendment to the claims there to encompass such transactions. *Cameron* Dkt. 99, at 2.

IV. MOTIONS

Per the local rules and the Court's previous relation orders, Plaintiffs filed an administrative motion to relate, which Apple did not oppose. The Court granted this motion on September 2, 2022. (ECF No. 28.) The case was reassigned to this Court on September 6, 2022. (ECF No. 29.)

On September 9, 2022, the Parties filed a stipulated request to extend briefing on any motion to dismiss, so that any opposition would be due December 16, 2022, and any reply in support of a motion to dismiss would be due January 10, 2023. (ECF No. 31.) The request remains pending.

On October 28, 2022, Apple filed its Motion to Dismiss, (ECF No. 41), together with its Request for Judicial Notice (ECF No. 42). Apple anticipates moving to stay discovery in light of Plaintiffs' October 31, 2022 assertion that Apple would need to move for a protective order to delay discovery, *see infra*, at VIII.A.

At present, the Parties anticipate motions for summary judgment by each side. Also, Plaintiffs anticipate filing one or more motions for class certification. Plaintiffs also may file one or more motions to amend their complaint where such amendments are not allowed as a matter of right or by agreement among the Parties. Apple reserves its right to object to such amendments. The Parties reserve the right to bring any other future motions.

V. AMENDMENT OF PLEADINGS

A. Plaintiffs' statement

As reflected in the proposed schedule attached as Exhibit A, Plaintiffs have reserved the right to amend their Complaint, including in response to a motion to dismiss or answer. They also reserve the right to seek to amend their Complaint, or any Amended Complaint, as facts, law, and circumstances warrant, in their discretion.

B. Apple's statement

Apple reserves its right to oppose any attempt by Plaintiffs to seek to amend their Complaint, or any Amended Complaint, outside the agreed-upon 35-day period after October 28, 2022, when Apple served Plaintiffs with its Motion to Dismiss. To serve the interests of judicial efficiency and economy, Apple believes that the schedule should include a deadline 30-days after any ruling on the Motion to Dismiss for any further amendment of the complaint.

VI. EVIDENCE PRESERVATION

The Parties confirm that they have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information and that they met and conferred pursuant to Fed. R. Civ. P. 26(f), including with respect to reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action. Because this case has been related to *Pepper*, it is “bound by . . . the stipulation[] regarding ESI” entered as an order of the Court in *Pepper*. (*Pepper* ECF No. 194, ¶ 7.) However, the Parties are discussing whether any modifications to that ESI protocol would be appropriate in this case. The Parties agree that ESI should be a topic for continued discussion.

VII. DISCLOSURES

The Parties have agreed to stipulate to moving the deadline to exchange initial disclosures to no earlier than November 14, 2022.

A. Plaintiffs’ statement

Per Fed. R. Civ. P. 26(a)(1)(C), the Parties’ initial disclosures would already be due, except that the Parties have agreed that they should be due no earlier than November 14. Plaintiffs see no need to delay initial disclosures to a date beyond November 14, and they note that in *Cameron*, the parties agreed to exchange (and did exchange) initial disclosures, starting from scratch, a week after the first case management conference there, despite Apple’s stated plan at the time to file a motion to dismiss. (*Cameron* ECF No. 54.) With respect to Apple’s assertion below that Plaintiffs have made it clear they will amend their Complaint, Plaintiffs continue to analyze Apple’s three-day-old motion to dismiss and have not yet determined whether they will file an amended complaint in response, or whether they will file an opposition brief.

As for the form of Apple’s initial disclosures, whether it deems them “supplemental” or otherwise, Plaintiffs’ view is that the disclosures must comport with the requirements of Rule 26(a)(1)(A) as they apply to this case.

B. Apple’s statement

Because this matter is related to *Pepper*, under the Court’s Order Granting Stipulation Regarding Coordination of Discovery (*Pepper* ECF No. 194, ¶¶ 6-7), Apple’s initial disclosures in *Pepper* apply as Apple’s initial disclosures here. Accordingly, only supplemental disclosures,

1 necessary and relevant to this matter, are required of Apple. It is Apple's position that the Parties'
2 exchange of initial disclosures (or, with respect to Apple, supplemental disclosures) should wait until
3 after the Court issues a ruling on Apple's Motion to Dismiss, or any future motion to dismiss an
4 amended complaint, if it rules that any claims may proceed. If the Court grants Plaintiffs leave to
5 further amend their complaint, then the exchange should follow the Court's order on any motion to
6 dismiss a further amended complaint. Apple notes that the parties in *Cameron* did not exchange initial
7 disclosures until after the *Cameron* plaintiffs amended their complaint (*Cameron* ECF No. 53).
8 Moreover, at that point in time, none of the discovery in these related App Store cases—including
9 *Pepper*—had commenced. Apple also notes that it did not file a motion to dismiss in *Cameron* after
10 the Court expressed a disinclination to consider issues in that case on the pleadings. Here, given that
11 Plaintiffs have made clear that they will amend their Complaint, there is no reason to commence
12 discovery at this point.

13 **VIII. DISCOVERY**

14 The Parties have conferred pursuant to Fed. R. Civ. P. 26(f), and they propose and report as
15 follows. The Parties expect their initial discovery plan to consist of a case schedule (including
16 discovery deadlines) (*see* Ex. A hereto) and a protective order. Plaintiffs have drafted a protective
17 order and sent it to Apple for its consideration. Because this case has been related to *Pepper*, it is
18 "bound by [*Pepper*'s] protocols governing the coordination of discovery, as well as the stipulations
19 regarding ESI and expert discovery" entered as orders of the Court in *Pepper*. (*Pepper* ECF No. 194,
20 ¶ 7.) However, the Parties are discussing whether any modifications to those orders would be
21 appropriate in this case. Each side reserves rights to move the Court to modify any of these orders if
22 modification is deemed necessary by a side and agreement cannot be reached.

23 **A. Plaintiffs' statement as to the commencement of discovery**

24 Plaintiffs' view is that discovery should begin on November 7, 2022. Again, this is essentially
25 parallel to *Cameron*, where discovery commenced a week after the first CMC, notwithstanding that
26 Apple planned to file a motion to dismiss there. (*Cameron* ECF No. 54.) Furthermore, this comports
27 with Fed. R. Civ. P. 26(d), under which discovery could have begun earlier, following the Parties'
28 initial Rule 26(f) conference (though waiting a short period afforded time for Apple draft its motion to

1 dismiss and Plaintiffs to review it, which will help to inform initial discovery requests). If Apple wants
2 to delay discovery, including in light of its motion to dismiss, which raises factual issues in Plaintiffs’
3 view including as to its FTAIA defense, then respectfully, it should file a motion for protective order
4 at an appropriate time, so that the pertinent issues can be fully briefed. Otherwise, in Plaintiffs’ view,
5 commencing discovery without delay will only lead to a more efficient litigation of this case. Plaintiffs
6 are willing to discuss this matter with Apple further in advance of the CMC scheduled for November
7 7; however, it makes the foregoing observations and comments in light of Rule 26 and the Parties’
8 apparent impasse.

9 Plaintiffs also note the ease with which Apple can re-produce or make available all discovery
10 produced in *Cameron*, including documents stored in what Plaintiffs assume to be an active *Pepper*
11 database. And Apple itself indicates that it is willing to make certain data available to Plaintiffs
12 immediately (though not transactional or other data pertaining to Plaintiffs and proposed class
13 members in the instant case), which underscores the ease of production here.

14 Finally, Plaintiffs note that Apple seeks to benefit from the coordination order entered in
15 *Cameron* and *Pepper*, while seemingly ignoring the provision indicating that discovery served in those
16 cases should be served on Plaintiffs now. (*Cameron* ECF No. 80 (“[F]uture responses to discovery
17 requests, and future discovery produced in response to such requests by parties and non-parties in any
18 of the Related App Store Actions shall be served on counsel for all parties in the Related App Store
19 Actions.”).)

20 **B. Apple’s statement as to the commencement of discovery**

21 It is Apple’s position that no discovery should proceed in this matter unless and until the Court
22 issues a ruling allowing Plaintiffs’ claims to proceed in whole or part. If the Court grants Plaintiffs
23 leave to further amend their complaint, then discovery should not commence unless and until the Court
24 issues a ruling allowing Plaintiffs’ amended claims to proceed in whole or part. As stated *supra*, at
25 VII.B, Plaintiffs’ comparison to the *Cameron* proceedings is unpersuasive. Discovery in *Cameron* did
26 not commence until after the plaintiffs there filed their amended complaint. Plaintiffs here are not
27 similarly situated in this respect to the *Cameron* plaintiffs. Having waited until after *Cameron* settled
28

1 to bring their nearly identical claims, Plaintiffs should not be able to force the immediate
2 commencement of discovery before the Court tests the viability of those claims.

3 On October 31, 2022, Plaintiffs stated their position for the first time that Apple should move
4 for a protective order in order to delay discovery, rather than continue to confer over the
5 commencement of discovery. Accordingly, a motion to stay discovery by Apple will be forthcoming,
6 pending discussion of these issues at the Case Management Conference.

7 **C. Discovery taken to-date**

8 No discovery has been conducted by either Plaintiffs or Apple to-date.

9 **D. Scope of proposed anticipated discovery**

10 **1. Plaintiffs' statement**

11 Plaintiffs intend to serve their first requests for production on the Defendant on November 7,
12 2022.

13 As part of discovery in this matter, Plaintiffs seek production of, or access to, all discovery
14 materials, first- and third-party and otherwise, which plaintiffs in *Cameron v. Apple Inc.* received, or
15 were allowed access to, or generated (for example, deposition transcripts). These items and data will
16 include materials made available to the *Cameron* plaintiffs pursuant to the discovery coordination
17 order entered in the *Cameron* and *Pepper* cases (which also applied in the *Epic Games* case). Plaintiffs
18 ask that these materials be promptly produced or otherwise made available to them in this matter. (*See*
19 *Sec. VIII.E.1.a, infra.*)

20 Plaintiffs also seek production of all material that may already have been produced to—or that
21 will be produced to—governmental agencies, regulators, or legislative bodies, domestic or foreign
22 (including but not limited to French and European Union/European Commission agencies) regarding
23 any contention that, or in any investigation regarding whether, Apple monopolizes (or monopsonizes)
24 a global or domestic (including U.S. or foreign-domestic) market or sub-market for iOS app
25 distribution and IAP services. They also seek materials produced to the Committee on the Judiciary of
26 the U.S. House of Representatives in response to its requests dated September 13, 2019 or otherwise
27 (to the extent not already covered by the reference to materials produced or otherwise made available
28 to plaintiffs in the *Cameron* matter).

1 Further, Plaintiffs seek discovery into market conditions, barriers to entry, Apple's app-
2 distribution and IAP commissions or fees, the efforts, expenses, and costs associated with operating
3 the App Store and any marketing efforts related thereto, any IP defenses raised by Apple, responses to
4 purported competition, and any purported business justifications for Apple's business model.
5 Additionally, they seek discovery into iOS developers', including their own, participation in the U.S.
6 domestic market for iOS distribution and IAP services, which entailed dealing with Apple Inc. in the
7 U.S., by way of the Internet and otherwise. As noted, Plaintiffs are evaluating Apple's recently filed
8 motion to dismiss, which raises Apple defenses. Plaintiffs seek discovery as to its FTAIA defense, as
9 well as other defenses—including its timeliness defenses, which are belied by applicable statutes of
10 limitation and the Parties' contracts, among other factors, and which fare no better under the equitable
11 doctrine of laches—and other matters raised in the motion, such as its ATT program.

12 Additionally, Plaintiffs seek discovery from Apple and appropriate third-parties regarding or
13 consisting of: relevant market/sub-market considerations; App Store-related profits and margins; apps
14 and related digital products sold in the App Store, including pricing and volume data; discoverability
15 in the App Store of apps and related digital products; output issues; pertinent technical, hardware, and
16 software considerations, including as they pertain to enforcement of Apple's lock on iOS distribution
17 and IAP services; pertinent contracts, policies, and practices, including as to pricing policies and
18 mandates; responses to foreign governments' or tribunals' mandates or orders regarding IAP and app
19 distribution; the annual fee charged to iOS developers (and any other such fees); requirements to use
20 Apple distribution and IAP services, and the details thereof; materials regarding competition or the
21 lack thereof; Apple Arcade, iPadOS, watchOS, and iMessage apps or in-app products; Apple's App
22 Tracking Transparency program; governmental taxes or fees; Apple's review of apps and in-app
23 products and failures thereof, as well as scam or fraudulent or other bad apps or in-app products sold
24 in or via the App Store or in apps acquired therefrom; security breaches relating to iOS apps, in-app
25 products, and IAP; money laundering via the App Store or IAP; Mac-related app and in-app product
26 distribution, including Apple's notarization and Gatekeeper systems; and Apple's competition with
27 iOS developers, among related and other matters raised in Plaintiffs' Complaint.

1 Further, Plaintiffs anticipate taking depositions of the Defendant, present and former
2 representatives, and non-parties regarding the above and related topics, and other topics pertinent to
3 their claims and the Defendant's defenses, as they pertain to this matter. These may include depositions
4 of witnesses deposed previously by plaintiffs or others in the *Cameron* and related consumer and *Epic*
5 *Games* cases.

6 **2. Apple's statement**

7 It is Apple's position that no discovery should proceed in this matter unless and until the Court
8 issues a ruling allowing Plaintiffs' claims to proceed in whole or part. If the Court grants Plaintiffs
9 leave to further amend their complaint, then discovery should not commence unless and until the Court
10 issues a ruling allowing Plaintiffs' amended claims to proceed in whole or part.

11 Apple has already expended massive resources litigating *Cameron*, a nearly identical—and
12 now settled—case. Given the “enormous expense of discovery,” *Bell Atlantic Corp. v. Twombly*, 550
13 U.S. 544, 558 (2007), Apple should not be forced to bear the burden of additional discovery on claims
14 lodged years after they expired—and especially not before this Court considers whether to allow these
15 claims to proceed. *See also Reveal Chat Holdco, LLC v. Facebook, Inc.*, 2020 WL 2843369, at *4
16 (N.D. Cal. Apr. 10, 2020) (discovery in “antitrust cases . . . tends to be broad, time-consuming and
17 expensive” (citation omitted)). After years of sitting on their claims, Plaintiffs should not be permitted
18 to force Apple to engage in additional discovery prematurely.

19 Other circumstances of this case also warrant delaying discovery until Apple's Motion to
20 Dismiss is resolved (along with any future motions to dismiss any further iterations of the complaint).
21 As stated above, the primary difference between this action and *Cameron* is that this action is brought
22 on behalf of foreign developers and covers non-U.S. transactions, yet those transactions are barred by
23 the FTAIA. Apple's pending Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and
24 12(b)(6) addresses whether the FTAIA bars Plaintiffs' claims based on foreign sales, in addition to
25 raising several other deficiencies with Plaintiffs' Complaint, including its timeliness, Plaintiffs'
26 standing to challenge ATT, whether Plaintiffs have stated a claim challenging ATT, and GESTE's
27 standing to raise any claims. The Court can decide these issues as a matter of law. Commencing
28 discovery on the basis of this complaint—which Plaintiffs have previewed they will almost certainly

1 amend—at this juncture would impose substantial and unnecessary burdens on the Parties. Until the
2 Court decides that any of Plaintiffs’ claims may move forward, discovery is premature.

3 That said, in light of Plaintiffs’ position that discovery should begin on November 7, 2022,
4 Apple offered to provide (within seven days of entry of a protective order) access to transactional data
5 that was produced to the *Cameron* plaintiffs, as well as additional transactional data recently produced
6 to the *Pepper* plaintiffs. This offer was designed to balance Apple’s concerns with expending
7 unnecessary resources on discovery if the case were to be dismissed and Plaintiffs’ interest in data
8 potentially helpful in evaluating their claims and preparing a motion for class certification should the
9 case proceed. Plaintiffs declined Apple’s offer.

10 **E. Proposed limitations or modifications of the discovery rules**

11 **1. Production of *Cameron* material**

12 **a. Plaintiffs’ statement**

13 As noted in Sec. VIII.D.1 above, Plaintiffs request production of, or other access to, all
14 discovery materials to which the *Cameron* plaintiffs had access in their case. Plaintiffs request that
15 such production be made, or access granted, within seven (7) days of entry into a protective order in
16 this matter. *See* Fed. R. Civ. P. 34(b)(2)(A) (“The party to whom the request is directed must respond
17 in writing within 30 days after being served *A shorter or longer time may be stipulated to under*
18 *Rule 29 or be ordered by the court.*”) (emphasis added).

19 **b. Apple’s statement**

20 As stated above, Apple’s position is that no discovery should proceed in this matter unless and
21 until the Court issues a ruling allowing Plaintiffs’ claims to proceed in whole or part. If the Court
22 grants Plaintiffs leave to further amend their complaint, then discovery should not commence unless
23 and until the Court issues a ruling allowing Plaintiffs’ amended claims to proceed in whole or part.
24 Apple does not object to making all discovery materials from *Cameron* available to Plaintiffs here,
25 pursuant to the discovery coordination order (*Pepper* ECF No. 194, ¶ 7), once discovery opens.
26
27
28

1 **2. Depositions**

2 **a. Plaintiffs' statement**

3 Plaintiffs' view is that relief from the limitation on the number of depositions set forth in Rule
4 30(a)(2) is necessary and appropriate. At present, and based on the experience of counsel in the
5 *Cameron* matter, the Plaintiffs here request leave for each side to take up to 15 depositions in this
6 matter—though more depositions may reasonably be needed as circumstances and factual and legal
7 developments merit. Plaintiffs presently expect to depose a mix of Party and non-party witnesses. It is
8 Plaintiffs' position is that discovery in this action may reasonably include depositions of witnesses
9 previously deposed by plaintiffs or others in the *Cameron* and related consumer and *Epic Games* cases.
10 Plaintiffs have explained their view to Apple that this is a different, subsequently filed case (and one
11 that post-dates discovery undertaken in light of the coordination order entered in *Pepper* and
12 *Cameron*), with its own issues, including, *e.g.*, Apple's defenses now explicitly raised in its motion to
13 dismiss, as well as data which was not produced in *Cameron* and the related cases. Plaintiffs reserve
14 rights to seek to modify the coordination order as necessary in their view, including in the event the
15 Parties cannot reach agreement on a particular subject referenced in that order.

16 **b. Apple's statement**

17 This is not a typical case in which plaintiffs start with a blank slate on discovery. This is the
18 *same* counsel challenging the *same* conduct of the *same* defendant as in *Cameron*. Plaintiffs come to
19 this case with extensive institutional knowledge and will have access to the full discovery taken in the
20 related cases. Thus, they should be able to proceed here with very targeted additional discovery—
21 including with respect to depositions. Apple maintains that no witnesses deposed previously by the
22 plaintiffs or others in *Cameron*, *Pepper*, or *Epic Games* may be deposed for this matter absent a
23 compelling justification. The *Pepper* “protocols governing the coordination of discovery,” to which
24 this case is bound as a related case (*Pepper* ECF No. 194, ¶ 7), provide that “[w]itnesses should only
25 be deposed once” (*id.* ¶ 3.) Apple maintains that any necessary, additional depositions should be
26 limited in scope to any new issues presented by this action, and that it is too early to tell if any relief
27 from Rule 30(a)(2) will be necessary.

1 **3. Document subpoenas to non-parties**

2 The *Pepper* “protocols governing the coordination of discovery,” to which this case is bound
3 as a related case (*Pepper* ECF No. 194, ¶ 7), prescribe certain procedures for conducting third-party
4 discovery. However, the Parties are discussing whether any modifications to those protocols would be
5 appropriate in this case. Each side reserves rights to move the Court to modify the reference protocols
6 if modification is deemed necessary by a side and agreement cannot be reached.

7 **4. Expert discovery**

8 Because this case has been related to *Pepper*, it is “bound by [*Pepper*’s] . . . stipulation[]
9 regarding . . . expert discovery” entered as an order of the Court in *Pepper*. (*Pepper* ECF No. 194, ¶ 7.)
10 However, the Parties are discussing whether any modifications to that order would be appropriate in
11 this case. Each side reserves rights to move the Court to modify the expert order if modification is
12 deemed necessary by a side and agreement cannot be reached.

13 **5. Service**

14 The Parties agree that service of any documents not filed via ECF, including pleadings,
15 discovery requests, subpoenas for testimony or documents, expert disclosure, and delivery of all
16 correspondence, whether under seal or otherwise, shall be sent by email to attorneys for the receiving
17 Party; the Parties will provide each other with service lists that can be used to serve documents. In the
18 event the volume of served materials is too large for email and requires electronic data transfer by file
19 transfer protocol or a similar technology, or overnight delivery, the serving Party will telephone or
20 email the other side’s principal designee when the materials are sent to provide notice that the materials
21 are being served. For purposes of calculating discovery response times under the Federal Rules of Civil
22 Procedure, electronic delivery shall be treated the same as hand delivery.

23 **6. Authenticity presumptions**

24 The Parties agree that documents produced by non-parties from the non-parties’ files shall be
25 presumed to be authentic within the meaning of Fed. R. Evid. 901. Documents produced by Defendant
26 shall be presumed to be authentic within the meaning of Fed. R. Evid. 901. If a Party serves a specific
27 good-faith written objection to the authenticity of a document that it did not produce from its files, the
28 presumption of authenticity will no longer apply to that document. Any objection to a document’s

1 authenticity must be provided with (or prior to) the exchange of objections to trial exhibits. The Parties
2 will promptly meet and confer to attempt to resolve any objections. The Court will resolve any
3 objections that are not resolved through this means or through the discovery process.

4 **7. E-discovery order**

5 Because this case has been related to *Pepper*, it is “bound by . . . the stipulation[] regarding
6 ESI” entered as an order of the Court in *Pepper*. (*Pepper* ECF No. 194, ¶ 7.) However, the Parties are
7 discussing whether any modifications to that ESI protocol would be appropriate in this case. Each side
8 reserves rights to move the Court to modify the ESI protocol if modification is deemed necessary by a
9 side and agreement cannot be reached.

10 **8. Identified discovery disputes**

11 At present, the Parties identify and report no discovery disputes, other than the disagreements
12 regarding the timing and scope of discovery outlined above.

13 **IX. CLASS ACTION**

14 All attorneys of record for the Parties have reviewed the Procedural Guidance for Class Action
15 Settlements.

16 **1. Plaintiffs’ statement**

17 Plaintiffs propose that a class or classes be certified pursuant to Fed. R. Civ. P. 23(a), 23(b)(1),
18 23(b)(2), and 23(b)(3), or some combination thereof. They propose to file a motion for class
19 certification pursuant to their proposed schedule as set forth in Exhibit A hereto, though they reserve
20 the right to ask the Court to modify the schedule for their motion (and otherwise) depending on
21 developments in the case, including with respect to discovery.

1 **2. Apple's statement**

2 Apple disputes that Plaintiffs may obtain class certification pursuant to Rule 23 of the Federal
3 Rules of Civil Procedure 23, or that Plaintiffs may establish a classwide basis for awarding monetary
4 or equitable relief.

5 **X. RELATED CASES**

6 As noted herein, the Court related the instant matter to the *Pepper* and *Epic Games* cases on
7 September 2, 2022. (ECF No. 28.) The Parties are not aware of other related cases or proceedings
8 pending before another judge of this Court, or before another court or administrative body.

9 **XI. RELIEF**

10 **1. Plaintiffs' statement**

11 Plaintiffs, on their own behalf, and on behalf of the proposed classes, seek all appropriate relief,
12 to include, but not be limited to, injunctive relief; declaratory relief; monetary relief, whether by way
13 of restitution or damages, including treble damages, or other multiple or punitive damages, or
14 restitution, where mandated by law or equity or as otherwise available; together with recovery of their
15 costs of suit, including their reasonable attorneys' fees, costs, expenses (including expert witness fees),
16 and pre- and post-judgment interest to the maximum extent available at law or equity. Plaintiffs'
17 requests for relief are more fully set forth in their Complaint.

18 **2. Apple's statement**

19 Apple disputes that Plaintiffs are entitled to any relief, or that Plaintiffs can establish a
20 classwide basis for awarding monetary or equitable relief. Apple reserves all of its defenses to
21 individualized remedies (assuming Plaintiffs are able to establish liability, which Apple vigorously
22 contests).

23 **XII. SETTLEMENT AND ADR**

24 No settlement discussions in this matter have taken place to-date. The Parties have discussed
25 ADR generally; their ADR options; and they have filed their ADR certifications in each case. The
26 Parties elect private mediation before a mutually agreeable third party, but believe that it is premature
27 to select any deadlines or processes. They anticipate that settlement discussions may be appropriate
28

1 following dispositive motions practice or class certification proceedings; following substantial
2 production in response to discovery requests; or at other times to be determined as the matter proceeds.

3 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

4 The Parties respectfully decline assignment to a magistrate judge for all further proceedings.

5 **XIV. OTHER REFERENCES**

6 The Parties agree that this case is not suitable for reference to binding arbitration and/or to a
7 special master.

8 **XV. NARROWING OF ISSUES**

9 On October 28, 2022, Apple filed a Motion to Dismiss the Complaint in full or in part. (ECF
10 No. 41.) Otherwise, the Parties agree it is too early to identify potential ways to expedite the
11 presentation of evidence at trial or otherwise narrow this matter by agreement or motion. No Party has
12 requested bifurcation of issues, claims, or defenses.

13 **XVI. EXPEDITED TRIAL PROCEDURE**

14 The Parties agree that this case is not suitable for handling under the Expedited Trial Procedure
15 of General Order No. 64.

16 **XVII. SCHEDULING**

17 Plaintiffs and Apple have negotiated and reached agreement where they could, with certain
18 unresolved disputes, on a case schedule. The proposals and remaining disputes are set forth in the
19 attached Exhibit A. After discussion and rulings or modifications made by the Court at the Case
20 Management Conference scheduled for November 7, 2022, the Parties will submit a proposed case-
21 schedule order to the Court for entry.

22 The Parties reserve the right to ask for modifications to any schedule ordered by the Court, as
23 circumstances and case events warrant.

24 **XVIII. TRIAL**

25 Plaintiffs have demanded a jury trial and presently expect the trial to last 10 Court days. It is
26 Apple's position that if a trial is necessary, this action is conducive to resolution through a bench trial.
27 Apple believes that it is premature to estimate the length of trial before any discovery has been taken.
28

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

1. Plaintiffs' statement

Plaintiffs have filed their Certifications of Interested Entities or Persons. (ECF Nos. 32-34.) Pursuant to Fed. R. Civ. P. 7.1(a), Figaro has reported that its parent entity is Groupe Industriel Marcel Dassauland; L'Équipe has reported that its ultimate parent entity is Les Editions P. Amaury SA; and Le GESTE has reported that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Further, pursuant to Civil L.R. 3-15, Figaro and L'Équipe, respectively, have advised that the following listed persons, associations of persons, etc., (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: Figaro: Groupe Industriel Marcel Dassault (parent entity with financial interest); L'Équipe: Les Editions P. Amaury SA (parent entity with financial interest). Le GESTE has advised that it has no such entity to report.

2. Defendant's statement

Defendant has filed its Certification of Interested Entities or Persons. (ECF No. 35.) Pursuant to Civil L.R. 3-15, the undersigned certifies that other than the named parties, there is no such interest to report.

XX. PROFESSIONAL CONDUCT

The Parties confirm that all attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

XXI. OTHER

1. Plaintiffs' statement

In the Plaintiffs' view, complex antitrust class actions such as this one present special case management issues, in particular the efficient and timely completion of discovery. Given the issues likely to arise in the course of litigating this matter, Plaintiffs believe that these actions would benefit from quarterly status conferences in person, telephone conference, or video conference on dates and at times convenient for the Court. *See* Manual for Complex Litigation, Fourth §11.22 (2004).

To the extent status conferences are held quarterly or at other intervals, Plaintiffs propose that the Parties jointly file a Further Status Conference Report seven days in advance of the status conference setting forth what issues, if any, there are for discussion with or resolution by the Court.

2. Defendant's statement

Apple defers to the Court's determination regarding scheduling of future status conferences and will work with Plaintiffs to file joint case management statements in advance of any such conference pursuant to the Court's local rules.

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DATED: October 31, 2022

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman

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Proposed Classes*

1
2 Dated: October 31, 2022

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20 *Attorneys for Defendant Apple Inc.*

ATTORNEY ATTESTATION

I, Cynthia E. Richman, am the ECF user whose identification and password are being used to file the foregoing document. Pursuant to Civil Local Rule 5-1(h)(3) regarding signatures, I attest that concurrence in the filing of this document has been obtained.

Dated: October 31, 2022

By: /s/ Cynthia E. Richman

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DRAFT EXHIBIT A

Deadline/Event	Plaintiffs' Proposal	Defendant's Proposal
Apple's Motion to Dismiss (or Answer) Plaintiffs' Complaint	October 28, 2022	same
Commencement of Discovery	November 7, 2022	After ruling on MTD (with exception that plaintiffs may request transactional data produced to-date in <i>Pepper</i>)
Apple re-produces/grants access to discovery materials available to <i>Cameron</i> plaintiffs	Within 7 (seven) days following entry of protective order in instant matter	After ruling on MTD (with exception that plaintiffs may request transactional data produced to-date in <i>Pepper</i>)
Exchange of Initial Disclosures	November 14, 2022	Supplemental initial disclosures due after ruling on MTD
At their election, Plaintiffs file Amended Complaint in response to Apple's (a) Motion to Dismiss Complaint or (b) Answer to Complaint	December 2, 2022	same
Plaintiffs' Opposition to Apple's Motion to Dismiss Complaint (if Plaintiffs opt to oppose rather than file Amended Complaint)	December 16, 2022	same
Reply in support of Apple's Motion to Dismiss Complaint (assuming Plaintiffs do not file Amended Complaint in response thereto)	January 10, 2023	same
Apple's Motion to Dismiss Plaintiffs' Amended Complaint	(if Amended Complaint filed on or before December 2, 2022) January 10, 2023	Parties will meet and confer on an appropriate schedule when Amended Complaint is filed.
Hearing on Apple's Motion to Dismiss Plaintiffs' Complaint	To be determined by the Court	To be determined by the Court (Noticed for January 24, 2023)
Plaintiffs' Opposition to Apple's Motion to Dismiss Amended Complaint	February 28, 2023	Parties will meet and confer on an appropriate schedule when Amended Complaint is filed

Deadline/Event	Plaintiffs' Proposal	Defendant's Proposal
Reply in support of Apple's Motion to Dismiss Amended Complaint	March 24, 2023	Parties will meet and confer on an appropriate schedule when Amended Complaint is filed
Class Certification Motion and Supporting Expert Reports	December 15, 2023	Parties will meet and confer on an appropriate schedule after ruling on MTD
Hearing on Defendant's Motion to Dismiss Plaintiffs' Amended Complaint	To be determined by the Court	To be determined by the Court
Class Certification Opposition and Supporting Expert Reports	February 13, 2024	Parties will meet and confer on an appropriate schedule after ruling on MTD
Class Certification Reply and Reply Expert Reports	March 29, 2024	Parties will meet and confer on an appropriate schedule after ruling on MTD
Hearing on Class Certification	To be determined by the Court	same
Discovery motions or letter briefs filed	As necessary, but Plaintiffs will endeavor to file any such motions or letter briefs at least 30 days prior to the closure dates for fact and expert discovery, based on the closure dates proposed by Plaintiffs	No deadline necessary
Deadline to complete fact discovery	60 days after decision on class certification	same
Deadline to amend the pleadings	60 days after decision on class certification	35 days after decision on MTD
Parties' expert reports filed	60 days after decision on class certification	same
Rebuttal expert reports filed	45 days after submission of initial expert reports	same
Reply expert reports filed	45 days after submission of rebuttal expert reports	same
Close of Expert Discovery	45 days after submission of reply expert reports	same
Dispositive (S.J.) Motion(s) filed	45 days after close of expert discovery	same
Opposition brief(s) filed	45 days after opening brief is filed	same
Reply brief(s) filed	30 days after opposition brief is filed	same

Deadline/Event	Plaintiffs' Proposal	Defendant's Proposal
Dispositive Motions (S.J.) Hearing	To be determined by the Court	same
Pretrial Conference	To be determined by the Court	same
Trial	To be determined by the Court	same